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The Future of Racial Redistricting in Voting: *Clark v. Calhoun County, Mississippi*.

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THE FUTURE OF RACIAL REDISTRICTING IN VOTING: *CLARK V. CALHOUN COUNTY, MISSISSIPPI.*[1]

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INTRODUCTION

Recent high-profile lawsuits involving The University of Texas at Austin's law school admissions program, Mark Fuhrman's guilt or innocence for perjury, and Texaco's employment practices, each contained racial decisions which inflamed and divided the nation.[2]

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[1] 88 F.3d 1393 (5th Cir. 1996).

[2] In *Hopwood v. Texas*, Sheryl Hopwood, along with three other white students, sued The University of Texas at Austin Law School for reverse discrimination after being denied admission. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). The admissions plan considered white and minority applicants on separate tracks, in order to increase the number of minority students admitted. *Hopwood*, 78 F.3d at 936-37. The *Hopwood* ruling, which found this approach unacceptable, held that the school could no longer use race as a factor in admissions. *Id.* at 962.

In *People v. Simpson*, O.J. Simpson was charged with the brutal murders of his estranged white wife and a local white waiter. No. BA-097211 (Super. Ct. Los Angeles Cty., Oct. 3, 1995); *see* Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations As a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 875 (1996). Following his testimony in O.J. Simpson's trial, Mark Fuhrman was given three years probation and a $200 fine after pleading no contest to perjury for denying under oath that he had not used the word "nigger" in ten years. *See* V. Dion Haynes, *Fuhrman Bargains Out of Jail Time: Facing Perjury Charge, He Gets Three Year Probation*, CHI. TRIB., Oct. 3, 1996, at 3. Mark Fuhrman was a Los Angeles county police detective who allegedly found a bloody glove at the Simpson estate matching one found at the deceased's estate. *The Big Story*, (CNN television broadcast, Mar. 20, 1995).

In 1994, four employees of Texaco Inc. met in private at the company's White

The decisions exemplify the fact that no matter what the issue, race-based decisions are guaranteed a hearty debate. Affirmative action is no exception. Affirmative action attempts to balance past and present racial inequities by producing a level playing field for minority and non-minority competition.[3] Like all other race-based issues, the creation of affirmative action led to concerns about the appropriate balance needed to level the field.[4] The Supreme Court provided a constitutional answer to these concerns in 1995 when it stated that race-based affirmative action programs must be analyzed under strict scrutiny.[5] In other words, the programs must serve a compelling governmental interest and be the least restrictive alternative.

When Congress passed the Voting Rights Act, it was clear that Congress was concerned about discrimination in state-drawn voting districts.[6] Pursuant to this Act, any state wanting to redraw its districts

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Plains, N.Y., headquarters to discuss some personnel documents that had been requested in a race discrimination lawsuit. Sharon Walsh, *Destroying Documents and Legal Defenses; Experts Say Texaco Points Up How Shredders Can Come Back to Haunt Companies,* WASH. POST., Jan. 26, 1997. The company's treasurer was heard on a tape recording of the meeting saying that "[w]e're going to purge the [expletive] out of these books. . . . We're not going to have any [expletive] thing that . . . we don't need to be in them." *Id.* Texaco agreed to pay $176.1 million to approximately 1,400 current and former black employees to end a race-discrimination suit. Allanna Sullivan, *EEOC, Texaco and Plaintiffs' Lawyers Seek to End Differences Over Settlement*, WALL ST. J., Dec. 23, 1996, at B5.

[3] *See* BLACK'S LAW DICTIONARY 59 (6th ed. 1990) (defining affirmative action programs as, "positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination").

[4] *See*, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630–31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.").

[5] *See* Adarand v. Pena, 515 U.S. 200, 220 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

[6] *See* Miller v. Johnson, 515 U.S. 900, 926 (1995). In *Miller*, the Court stated that:

must submit the state's proposal to the Justice Department for approval.[7] Approval, however, did not shield the redistricting plan from subsequent attack.[8] The creation of the Voting Rights Act sparked the related issue of whether compliance with the Voting Rights Act served a compelling governmental interest. For, if compliance with the Voting Rights Act is a compelling interest, the state, assuming it chose the least restrictive alternative, would be allowed to use race as a factor in designing its districts.[9]

The Fifth Circuit answered the compelling interest question in *Clark v. Calhoun County, Miss.*, in holding that Calhoun County, Mississippi's 1990 redistricting plan violated the Voting Rights Act.[10] Through analyzing two recent Supreme Court opinions, the circuit court found that compliance with the Voting Rights Act was a compelling interest. Equally compelling was the Supreme Court's

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> Section 5 [of the Voting Rights Act] was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, to shift the advantage of time and inertia from the perpetrators of the evil to its victim, by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.

Id. (citing Beer v. United States, 425 U.S. 130, 140 (1976) (internal citations omitted)).

[7] *See* 42 U.S.C. § 1973(c) (1965) (stating that any alteration of voting qualification or procedure should not have the purpose or effect of denying or abridging the right to vote on account of race or color).

[8] *Id.*

[9] As discussed in Part IV of this Note, the Supreme Court's recent move to "watered-down" strict scrutiny of race-based redistricting does not require the least restrictive alternative.

[10] Clark v. Calhoun County, Miss., 88 F.3d 1393, 1400 (5th Cir. 1996).

application of a new level of scrutiny, "watered-down"[11] strict scrutiny, to affirmative action redistricting programs. Although the Supreme Court continues to apply "traditional" strict scrutiny to other race-based affirmative action programs, the Court now applies less scrutiny to racially drawn voting districts.

This Note analyzes the Fifth Circuit's opinion in *Clark* and provides additional support for the identification of the Supreme Court's new scrutiny of race-based redistricting. Part I of this Note provides the factual and procedural background of *Clark*. Part II focuses on the Fifth Circuit's holding that Calhoun County's redistricting plan violated the Voting Rights Act. Part III tracks the Fifth Circuit's analysis of two recent Supreme Court opinions concerning the constitutionality of affirmative action in redistricting and identifies the new compelling interest. Part IV explains the concept of "watered-down" strict scrutiny and supports the conclusion that the Supreme Court has moved to a lesser "watered-down" strict scrutiny of affirmative action in redistricting. The Fifth Circuit's findings, coupled with the Supreme Court's recent move to "watered-down" strict scrutiny, should ensure continued use of race as a factor in voter redistricting.

I. FACTS AND PROCEDURAL HISTORY

Following the release of the 1990 census, Calhoun County, Mississippi's Board of Supervisors hired a consulting group to develop a redistricting plan that reflected the population changes in the county.[12] In addition, the Board appointed a biracial committee

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[11] Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (O'Connor, J., dissenting).

[12] *Id.* at 1394. According to the 1990 census, black residents comprise 23% of the county's voting age population and 27% of its population overall. *Id.* at 1395. The County experienced an overall decrease in population of 736 people, but a 1.52% increase in the black population from 1980 and a 1.52% decrease in the white population. Clark v. Calhoun County, 813 F. Supp. 1189, 1191 (N.D. Miss. 1993).

The redistricting plan divided Calhoun County's black population "roughly

made up of one black resident and one white resident from each election district to supervise the consultant's work.[13] This biracial committee approved one of the consultant's redistricting proposals, and the Board formally adopted it after a public hearing.[14] Pursuant to the Voting Rights Act, the Department of Justice subsequently precleared the proposed redistricting plan.[15]

James Clark and Barbara Brown (collectively "Clark") were black residents and registered voters in Calhoun County. Clark sued Calhoun County, the Calhoun County Democratic Executive Committee, the Calhoun County Republican Executive Committee, and the Calhoun County Election Commission (collectively "Calhoun County"), alleging that Calhoun County's redistricting plan violated

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equally among [its] five districts, ranging from a low of 19% of the population in [one district] to a high of 42% in [another district]." *Clark*, 88 F.3d at 1395. The Board of Supervisors requested that the consultants consider the following criteria in its redistricting: (1) "[i]f at all possible, the population deviation should be held to 5% or less"; (2) "[t]he voting strength of all minorities within the County should be considered so as not to dilute their present strength and/or to 'pack' any one district in order to dilute the overall minority voting strength"; (3) "[i]f possible, no incumbent supervisor should be placed in a district with another incumbent supervisor"; (4) "[t]he present voting precincts should be maintained if at all possible"; and (5) "[t]he separate bonded indebtedness of Districts 1 and 4 should be considered in order to minimize taxing districts and confusion." *Clark*, 813 F. Supp. at 1192.

Clark was one of several redistricting cases litigated after the 1990 census. *Id.* at 1189; *See generally* Bush v. Vera, 116 S. Ct. 1941, 1950 (1996) ("This is the latest in a series of appeals involving racial gerrymandering challenges to state redistricting efforts in the wake of the 1990 census."); Shaw v. Hunt, 116 S. Ct. 1894 (1996) [hereinafter Shaw II]; United States v. Hays, 515 U.S. 737 (1995); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993) [hereinafter *Shaw I*].

[13] *Clark*, 88 F.3d at 1394.

[14] *Id.* at 1394-95.

[15] *Id.* at 1402. Justice Department pre-clearance does not prevent subsequent attack. *See* 42 U.S.C. § 1973(c) (1982).

Section 2 of the Voting Rights Act.[16] Section 2 of the Voting Rights Act prohibits any voting practice or procedure that "*results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[17] Clark claimed the redistricting plan resulted in a dilution of the minority vote in Calhoun County, thus violating Section 2.

After a bench trial, the District Court granted judgment to Calhoun County, concluding that Clark had failed to establish a prima facie case of vote dilution under the Voting Rights Act.[18] Specifically,

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[16] Clark v. Calhoun County, Miss., 813 F. Supp. 1189, 1191 (N.D. Miss. 1993). Clark originally sued Calhoun County alleging violation of Section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments to the U.S. Constitution. *See Clark*, 88 F.3d at 1395. Although the District Court dismissed Clark's constitutional claims, Clark only appealed the Section 2 claim. *Id.*

[17] Voting Rights Act of 1965, § 2, as amended, 42 U.S.C. § 1973 (1982) (emphasis added). In 1982, Congress amended the Voting Rights Act by changing the language of § 2(a) and adding § 2(b), which provides a "results" test for violation of § 2(a). *Bush*, 116 S. Ct. at 1960. A violation exists if:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. (quoting 42 U.S.C. § 1973(b) (1982)).

[18] *Clark*, 813 F. Supp. at 1202. This article suggests that a prima facie case satisfies the three *Gingles* preconditions. In *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), The Supreme Court listed three preconditions for establishing a Section 2 violation: (1) "that [the minority group] is sufficiently large and *geographically compact* to constitute a majority in a single member district"; (2) "that [the minority group] is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Bush*, 116 S. Ct. at 1961; *Gingles*, 106 S. Ct. at 2766-67. These preconditions are necessary, but not sufficient to prove vote dilution. *See* 42 U.S.C. § 1973(b) (1982); *Bush*, 116 S. Ct. at 1960. If these preconditions are established, the minority group must further prove that under the totality of circumstances, they do not possess the same opportunities to participate in the political process and

the Court found that pursuant to Section 2, Clark failed to show that a geographically compact black majority district could be created in Calhoun County, and that vote dilution existed in light of the totality of the circumstances.[19] Clark appealed to the Fifth Circuit. The Fifth Circuit, not satisfied with the District Court's analysis, remanded the case with instructions for the District Court to reconsider and explain with respect to the totality of circumstances.[20]

On remand, Clark submitted a proposed redistricting plan regarding the feasibility of drawing a geographically compact district.[21] After reviewing the evidence, the District Court found that a geographically compact black majority district could be created and that racially polarized voting did exist in the county.[22] Noting that Clark had established a prima facie case of vote dilution under the Voting Rights Act, the Court reconsidered its findings regarding the totality of the circumstances.[23] Ignoring the Fifth Circuit's request for explanation with "particularity," the Court confirmed its previous findings and concluded that Clark, again, failed to prove vote dilution under the totality of the circumstances.[24] Once more, Clark appealed the District Court's judgment. [25]

The second appeal to the Fifth Circuit proved to be more fruitful for Clark than the first. The Fifth Circuit found the District Court's second opinion to be "far from the particularized explanation [the Circuit Court] expected."[26] The Fifth Circuit also stated that although "we would [normally] remand this case for further consideration . . . we need not do so where the record establishes unlawful vote

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elect representatives of their choice enjoyed by other voters. *See* 42 U.S.C. § 1973(b) (1982); *Bush*, 116 S. Ct. at 1960; *Clark*, 88 F.3d at 1398.

[19] *Clark*, 813 F. Supp. at 1202. *See infra* note 32 and accompanying text.

[20] Clark v. Calhoun County, Miss., 21 F.3d 92, 97 (5th Cir. 1994).

[21] Clark v. Calhoun County, Miss., 881 F. Supp. 252, 254 (N.D. Miss. 1995).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 256.

[25] *Clark*, 88 F.3d at 1395.

[26] *Id.* at 1396.

dilution."[27] The Court then discussed the record, concluding that considering the totality of the circumstances, vote dilution existed in Calhoun County.[28]

In addition to finding vote dilution, the Fifth Circuit addressed a second issue: whether a state could avoid a violation, or remedy a found violation of the Voting Rights Act by implementing race-based affirmative action in the state's redistricting.[29] Calhoun County argued that "racial considerations dominated the drawing of [Clark's] proposed district" and the proposals, therefore, violated the Equal Protection Clause.[30] Although the Fifth Circuit felt the County's argument had "more bite than might appear at first glance,"[31] the Circuit Court's analysis of two recent Supreme Court opinions found that affirmative action in voter redistricting serves a compelling interest. As a compelling interest, race-based redistricting used to avoid or remedy a found violation of the Voting Rights Act will survive strict scrutiny if a court finds that the scheme is narrowly tailored.

Clark, therefore, addressed two issues: whether Calhoun County's voter redistricting plan diluted the minority vote in violation of the Voting Rights Act, and whether Clark's proposed race-based redistricting plan violates the Equal Protection Clause. On the first issue, the Fifth Circuit held that Calhoun County's redistricting plan did, in fact, dilute the minority vote in violation of the Voting Rights Act.[32] On the second issue, the Fifth Circuit held that the proposed race-based redistricting plan was not ripe for review.[33] Although the

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[27] *Id.*

[28] The Fifth Circuit's discussion of the record is analyzed in Part III of this Note.

[29] *Clark*, 88 F.3d at 1402.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1407. Clark's proposed redistricting plan was created to establish one of the elements in his vote dilution claim. *See Clark*, 21 F.3d at 95 (stating that Clark's proposed districts were "simply presented to demonstrate that a majority-black district is feasible in Calhoun County"). The Fifth Circuit noted that

redistricting issue was not ripe, the Fifth Circuit's analysis of this issue is extremely significant because it identifies a new compelling interest.

II. CALHOUN COUNTY'S VOTER REDISTRICTING PLAN: VOTING RIGHTS ACT VIOLATION?

Early in its decision, the Fifth Circuit noted that its review was "hampered by the District Court's curt discussion regarding the totality of the circumstances."[34] The Court found further remand unnecessary because the record clearly established vote dilution.[35] The Fifth Circuit considered the vote dilution in Calhoun County to be a result of the County's redistricting procedure, which violated Section 2 of the Voting Rights Act[36] by denying or abridging the right of its citizens to vote due to race or color.[37]

In analyzing Clark's claims, the Fifth Circuit first turned its attention to the record. Because the District Court found that Clark had established a prima facie case of vote dilution under the Voting Rights Act,[38] the Fifth Circuit focused its review on the totality of the

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Calhoun County has primary jurisdiction over its electoral system. *Clark*, 88 F.3d at 1407 (quoting Westwego Citizens for Better Gov't v. City of Westwego, 946 F.2d at 1109, 1124 (5th Cir. 1991) [hereinafter *Westwego III*]), "It must be left to that body to develop, in the first instance, a plan which will remedy the dilution of the votes of the city's black citizens"). The Fifth Circuit reminded Calhoun County, however, that if it failed to develop a remedial plan, the federal District Court would. *Id.* (citing *Westwego III*, 946 F.2d at 1124, "fail[ure] to develop such a plan in a timely manner, or fail[ure] to develop a plan which fully remedies the current vote dilution, the responsibility for devising a remedial plan will devolve onto the federal district court").

[34] *Clark*, 88 F.3d at 1396.

[35] *Id.* (citing Harvell v. Blytheville Sch. Dist. #5, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1876 (1996)).

[36] *See* Voting Rights Act of 1965 § 2, as amended, 42 U.S.C. § 1973 (1982).

[37] *Clark*, 88 F.3d at 1401.

[38] *Clark*, 881 F. Supp. at 254.

circumstances.[39] In doing so, the Fifth Circuit relied on the Senate Report accompanying the 1982 Amendments to the Voting Rights Act[40] which lists various factors used to analyze the totality of the circumstances.[41] Those factors include: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.[42]

In analyzing *Clark*, the Fifth Circuit discussed five of the seven factors listed in the Senate Report, and disregarded two.[43] The Circuit

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[39] *Clark*, 88 F.3d at 1395.

[40] *Id.* at 1396.

[41] League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 849 (5th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 878 (1994) [hereinafter *LULAC*]; *see* 42 U.S.C. § 1973(b) (1982).

[42] *LULAC*, 999 F.2d at 849 n.22; *see* 42 U.S.C. § 1973(b) (1982).

[43] The Fifth Circuit disregarded the following two factors: (1) the history of voting-related discrimination in the State or political subdivision; and (2) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. *Clark*, 88 F.3d at 1399. The Fifth Circuit found

Court noted that the Senate Report does not require "that any particular number of factors be proved, or that a majority of them point one way or the other."[44]

First, the Fifth Circuit discussed the District Court's finding of racially polarized voting in Calhoun County.[45] The Circuit Court

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that the District Court did not err in "disregarding the history of past discrimination and socioeconomic disparity in Calhoun County." *Id.* In *LULAC*, the Fifth Circuit explained that "while Congress has not insisted upon proof of a causal nexus between socioeconomic status and depressed political participation, Congress did not dispense with proof that participation in the political process is in fact depressed among minority citizens." *Id.* (citing *LULAC*, 999 F.2d at 867; S.Rep. 417 at 29 n.114, reprinted in 1982 U.S.C.C.A.N. at 207 n.114). The Court held that "proof of socioeconomic disparities and a history of discrimination 'without more' did not suffice to establish the two Senate Report factors." *Clark*, 88 F.3d at 1399 (citing *LULAC*, 999 F.2d at 867).

[44] *Clark*, 88 F.3d at 1400 (quoting *Gingles*, 478 U.S. at 45) (quoting Thornburg v. Gingles, 478 U.S. 30, 45 (1986)).

[45] *Clark*, 88 F.3d at 1397. Racially polarized voting is evidenced by the tendency among minorities and whites to support different candidates where the accompanying losses by minority groups at the polls are somehow tied to race. *See LULAC*, 999 F.2d at 850. The Fifth Circuit noted that the District Court, in its first opinion, found that racially polarized voting existed in Calhoun County, but discounted its importance due to the success of black candidates seeking election to several municipal and county offices. *Id.* The District Court noted that black residents had been elected to the board of aldermen in two predominately white municipalities in the county and that one black resident, who ran unopposed, had been elected election commissioner in one of the predominately white districts. *Clark*, 813 F. Supp. at 1193. In Clark's first appeal to the Fifth Circuit, the Court concluded that the black electoral successes cited by the district court had "limited relevance." *Clark*, 21 F.3d at 96. The Fifth Circuit explained that the election of some black candidates does not negate a Section 2 claim and does not negate the possibility of racially polarized voting, particularly when the election is unopposed. *Id.* The Court further explained that "exogenous elections—those not involving the particular office at issue" have less probative value than elections involving the specific office that is the subject of the litigation. *Id.* at 97. While it remanded the case, the Fifth Circuit instructed the District Court to give greater weight to the "virtual absence of black electoral success in county-wide elections as opposed to their limited electoral success in municipal elections." *Id.* The District Court, on remand, reaffirmed its finding of racially polarized voting but construed the Fifth

found that the existence of racially polarized voting was "beyond question."[46] The Court stated that "[i]n addition to the 'uncontradicted' statistical evidence from the original trial," the expert witness' analysis of four multiracial elections in Calhoun County showed a "consistent relationship" between a voter's race and voting preference in those elections.[47] As an example, the Court noted that "in the 1991 Democratic primary for Constable, the black candidate received an estimated 71.6% of the black vote but only 7.8% of the white vote." While noting that the statistical evidence was not conclusive,[48] the Fifth Circuit stated that the record supported "no other conclusion but that racially polarized voting exists in Calhoun County"[49] and that Calhoun County offered no other explanation of the divergent voting patterns.[50]

Second, the Fifth Circuit pointed out that in Calhoun County "black citizen[s] have been unsuccessful in seeking public office."[51] The Fifth Circuit was unswayed by evidence that black residents had been elected as aldermen and Election Commissioner in Calhoun County, finding the probative value of these electoral successes of

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Circuit's instruction as an "invitation to find a section 2 violation simply because plaintiffs have prevailed on the *Gingles* factors." *Clark*, 881 F. Supp. at 256; *Clark*, 88 F.3d at 1397. In response, the Fifth Circuit stated that "the existence of the three *Gingles* preconditions is necessary but not sufficient to prove a § 2 violation," *see LULAC*, 999 F.2d at 849, but noted that "the existence of racially polarized voting and the extent to which minorities are elected to public office remain the two most important factors considered in the totality-of-circumstances inquiry." *Clark*, 88 F.3d at 1397; *see Gingles*, 478 U.S. at 48 n.15; *Westwego III*, 946 F.2d 1109, 1122 (5th Cir. 1991).

[46] *Clark*, 88 F.3d at 1397.

[47] *Id.* Dr. Richard Engstrom, a Professor of Political Science at the University of New Orleans, used both regression and homogenous precinct analysis to find the "consistent relationship." *Id.*

[48] *See Clark*, 21 F.3d at 96.

[49] *Clark*, 88 F.3d at 1397.

[50] *Id.* (citing Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir. 1995)).

[51] *Clark*, 88 F.3d at 1397.

"limited relevance."[52] The Court noted that "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote,"[53] and stated:

> these isolated victories, one of which occurred in a race with no opponent, do not mitigate the force of the [D]istrict [C]ourt's finding that "[i]n this century, no black candidate has been elected in Calhoun County as supervisor, justice court judge, constable, sheriff, circuit clerk, chancery clerk, tax assessor, superintendent of education, school board member, coroner, county attorney, state senator, or state representative.[54]

In response, Calhoun County argued that few black residents had run for county office.[55] The Fifth Circuit, however, asserted that this argument "overstate[d] the political reality, [because] since 1980 blacks have sought the positions of justice court judge, constable, sheriff, and school board member."[56] The Court questioned whether black residents "possess the same opportunities to participate in the political process" as do other resident voters.[57] The Fifth Circuit found that a claim of vote dilution was not precluded by the fact that

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[52] *Id.* (citing *Clark*, 21 F.3d at 96).

[53] *Clark*, 88 F.3d at 1397 (citing S.Rep. No. 417, 97th Cong., 2d Sess. 29 n.115 (1982) (internal quotation omitted), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 n.115; *Gingles*, 478 U.S. at 76; NAACP v. City of Niagara Falls, 65 F.3d 1002, 1009 (2d Cir. 1995); Harvell v. Blytheville School Dist. # 5, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1876 (1996)).

[54] *Clark*, 88 F.3d at 1397-98 (quoting *Clark*, 813 F. Supp. at 1193). The Fifth Circuit noted that "there is no suggestion that this striking lack of electoral success is due to low voter turnout or black support for non-minority candidates." *Clark*, 88 F.3d at 1398 (citing Alonzo v. City of Corpus Christi, 68 F.3d 944, 947 (5th Cir. 1995) (per curiam)).

[55] *See Clark*, 88 F.3d at 1398.

[56] *Id.* (citing *Clark*, 813 F. Supp. at 1193).

[57] *Clark*, 88 F.3d at 1398.

few, or even no, black citizens had sought public office in Calhoun County.[58]

The Fifth Circuit further discussed Calhoun County's majority vote requirement with regard to the third Senate Report factor: "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group."[59] In the District Court's original opinion, the Court found that a majority vote requirement was not inherently discriminatory. The District Court, however, acknowledged that abolishing the requirement might increase the possibility of electoral success for black candidates.[60] The Fifth Circuit pointed out that: first, even if the majority vote requirement was not "inherently discriminatory," Congress included it as one factor in the totality of the circumstances inquiry;[61] and second, under certain circumstances, the majority vote requirement "can operate to the detriment of minority voters" and negate their political strength.[62] For example, where more than two candidates run for a particular office, the majority vote requirement ensures that no candidate, if supported by only a minority of the population, will succeed. "In the presence of racially polarized voting, the majority vote requirement permits a white majority that scattered its votes among several white candidates in a election to consolidate its support behind the remaining white candidate in the run-off election,

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[58] *Id.* (citing Westwego Citizens For Better Government v. City of Westwego, 872 F.2d 1201, 1208 n.9 (5th Cir. 1989) [hereinafter *Westwego I*]). The Fifth Circuit said that holding otherwise "would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Clark*, 88 F.3d at 1398 (quoting *Westwego I*, 872 F.2d at 1208).

[59] *Id.*

[60] *Clark*, 88 F.3d at 1398.

[61] *Id.* (stating that courts are not free to second-guess Congress' judgment regarding a factor's importance).

[62] *Id.* (citing *Westwego III*, 946 F.2d at 1113 n.4).

thereby defeating the minority-supported candidate."[63] Thus, the Fifth Circuit held that the lower court failed to give appropriate consideration to the discriminatory nature of majority vote requirements.

The Fifth Circuit suggested that a black minority loss during a primary due to the scattering of white majority votes was more than a mere theoretical possibility in Calhoun County.[64] The Court pointed out at least one occasion where the majority vote requirement operated to the detriment of black voters by preventing the nomination of a black citizen as the Democratic candidate for constable in Calhoun County.[65] In the first primary, the black candidate finished first among all candidates, while not receiving a majority of the votes.[66] In the run-off election, the black candidate lost.[67]

In summation, the Fifth Circuit concluded that the presence of racially polarized voting and the virtual absence of black elected officials in county offices amounted to "striking evidence of vote dilution" in Calhoun County.[68] The Circuit Court was persuaded that, under the totality of the circumstances, Clark had demonstrated a Section 2 violation under the Voting Rights Act.[69]

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[63] *Id.* (citing Major v. Treen, 574 F. Supp. 325, 351 n.32 (E.D. La. 1983) (three judge panel); Zimmer v. McKeithen, 485 F.2d 1297, 1306 (5th Cir. 1973) (en banc) (noting that majority vote requirement tends "to submerge a political or racial minority"), *aff'd sub nom.*, East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam)).

[64] *Id.*

[65] *Id.* at 1398-99.

[66] *Clark*, 88 F.3d at 1399 (noting that the rest of the candidates were white).

[67] *Id.*

[68] *Id.* at 1398.

[69] *Id.* at 1400.

III. COULD A PROPOSED RACE-BASED REDISTRICTING PLAN BE CONSTITUTIONAL? THE FIFTH CIRCUIT'S PREDICTION AND THE SUPREME COURT'S NEW COMPELLING INTEREST

The Fifth Circuit's thorough analysis of the race-based redistricting issue uncovered the fact that race may be used as a predominant factor in redistricting pursuant to two 1996 Supreme Court plurality opinions (*Bush* and *Shaw II*).[70] In *Bush*, the Court "struck down three [race-based] Congressional districts in Texas," and in *Shaw II*, "invalidated North Carolina's Twelfth Congressional District," all as violative of the Constitution's Equal Protection Clause.[71] Although these redistricting plans were found unconstitutional, the language in these opinions signal the Supreme Court's changed approach to affirmative action in redistricting. The Fifth Circuit identified this new approach by recognizing that a majority of the current Supreme Court Justices: (1) have added a new compelling interest to the list of those which satisfy the first prong of strict scrutiny; and (2) recognize that state-sponsored race-based affirmative action programs in redistricting are not per se unconstitutional. Either proposition should result in continued use of race as a factor in redistricting.

The Supreme Court generally applies "strict scrutiny" to all race-based affirmative action programs.[72] The Fifth Circuit's first conclusion that "race-based redistricting, even that done for remedial

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[70] Interestingly, Clark's reply brief to the Fifth Circuit states, "the defendants made the same arguments to the District Court that they now make—contending that the plaintiffs' [proposed districts] violated traditional districting principles. The District Court did not credit or rely upon those arguments, and neither should this Court." App.Rep.Brief @ 6, Clark v. Calhoun, 88 F.3d. 1393 (5th Cir. 1996). The Fifth Circuit did not follow Clark's advice.

[71] *Clark*, 88 F.3d at 1404-05. In *Bush*, "[t]he three districts were the product of the Texas legislature's effort to increase the number of majority-minority districts in the State." *Id.* at 1404.

[72] *See Adarand*, 515 U.S. at 220

purposes, is subject to strict scrutiny" was, therefore, not surprising.[73] Within the redistricting context, however, it is only when race is a "predominant factor" motivating the State's redistricting decision that strict scrutiny is triggered.[74] The Fifth Circuit recognized that six[75]

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[73] *Clark*, 88 F.3d at 1405. The Fifth Circuit cited to *Miller v. Johnson*, 115 S. Ct. 2475 (1995), an earlier redistricting case, which described the evils of race-based redistricting, declaring that "'[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.'" *Id.* at 2486 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)).

[74] Bush, 116 S. Ct. at 1952. In *Miller*, the Supreme Court stated that the plaintiff must prove:

> either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 515 U.S. at 916. The Fifth Circuit pointed out that:

> Justice O'Connor added in her concurring opinion that this standard was 'a demanding one,' requiring the plaintiff to show that the legislature 'has relied on race in substantial disregard of customary and traditional districting practices.' In those cases where the plaintiff successfully proves that race was the 'predominant, overriding' consideration motivating the drawing of district lines, the burden shifts to the defendant to demonstrate that its districting plan is narrowly tailored to achieve a compelling governmental interest.

Clark, 88 F.3d at 1403 (citing *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring)).

[75] In reference to the predominant factor test, *Clark* contains a misprint in footnote 2 which reads "[o]n this point, at least *six* Justices sided with Justice O'Connor's view of the law." *Clark*, 88 F.3d at 1404 n.2 (emphasis added). The Fifth Circuit's analysis within the footnote clearly shows that five Justices sided with Justice

Supreme Court Justices agreed that whether a redistricting plan is subject to strict scrutiny depends upon whether the plaintiff can prove that race was a predominant factor in redistricting.[76] Because Clark's

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O'Connor's view of the law. Justices Kennedy (who reserved the question), Thomas and Scalia did not subscribe to the predominant factor test in *Bush*.

[76] The six Justices include Chief Justice Rehnquist and Justices O'Connor, Stevens, Souter, Ginsburg and Breyer. Writing for Chief Justice Rehnquist and herself, Justice O'Connor stated that:

> [s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts .... For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that, we mean that race must be 'the predominant factor motivating the legislature's [redistricting] decision."

Bush, 116 S. Ct. at 1951-52 (citations omitted) (brackets in original opinion).

Although Justice Kennedy joined the plurality opinion in *Bush*, he explicitly chose not to render an opinion on this issue. Kennedy stated,

> the opinion that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts . . . require comment. [This opinion is] unnecessary to our decision .... I do not consider these dicta to commit me to any position on the question whether race is predominant whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts or in a certain part of the State.

Id. at 1971 (Kennedy, J., concurring). Justice Stevens, joined by Justices Ginsburg and Breyer, stated that "the plurality reasonably concludes that race-conscious redistricting is not always a form of 'discrimination' to which we should direct our most skeptical eye." *Id.* at 1978 (Stevens, Ginsburg & Breyer, JJ., dissenting). In addition:

> [t]his Court has never held that race-conscious state decision making is impermissible in all circumstances. The threshold test for the application of strict scrutiny as set forth in Miller implicitly accepts this as true, concluding that strict scrutiny applies not when race merely influences the districting process, but only when the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'

Id. at 1977 n.8 (Stevens, Ginsburg & Breyer, JJ., dissenting) (internal citations omitted). Justice Souter, joined by Justices Ginsburg and Breyer, stated that "not

proposed race-based redistricting plan used race as a predominant factor, the Fifth Circuit's conclusion that race-based redistricting, remedial or otherwise, would be subjected to strict scrutiny was correct.[77]

Strict scrutiny requires the State to offer evidence to satisfy a two-prong test.[78] First, the State must offer evidence of a compelling state interest.[79] If a compelling interest is found, the State must then offer proof that its redistricting scheme is "narrowly tailored."[80] The Fifth Circuit explored the Supreme Court's current stance on each prong.

In addressing the first prong of this test, the Fifth Circuit identified a new compelling interest—"compliance with § 2 of the Voting Rights Act."[81] The Fifth Circuit, however, advised that mere intent to comply with the Voting Rights Act would not be sufficient to classify the State's race-based redistricting as compelling. Instead, the State must establish a "strong basis in evidence" for showing a violation of Section 2.[82] At least five Supreme Court Justices agreed with the first, and six Justices agreed with the second, of the propositions in *Bush*.[83]

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every intentional creation of a majority-minority district requires strict scrutiny." *Id.* at 2003 (Souter, Ginsburg, & Breyer, J.J., dissenting).

[77] *See* Clark, 88 F.3d at 1402, 1408 (stating that "[r]edistricting to remedy found violations of § 2 of the Voting Rights Act by definition employs race").

[78] *See Adarand*, 515 U.S. at 220.

[79] *Id.*

[80] *Id.*

[81] *Clark*, 88 F.3d at 1405.

[82] *Id.* at 1405-06 (stating that "the State must have a strong basis in evidence for concluding that the three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with § 2").

[83] With regard to the first issue, the five Justices included Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor stated that "the state interest in avoiding liability under VRA § 2 is compelling." *Bush*, 116 S. Ct. at 1969 (O'Connor, J., concurring). Justice Stevens, joined by Justices Ginsburg and Breyer, echoed Justice O'Connor's adoption of the new compelling interest stating that "a State has a compelling interest in complying with § 2 of the Voting Rights

Act . . . ." *Id.* at 1989 (Stevens, Ginsburg and Breyer, JJ., dissenting). Justice Souter, joined by Justices Ginsburg and Breyer, offered greater context to the Court's decision stating that:

> [i]n each of today's cases, the Court expressly assumes that avoiding a violation of the Voting Rights Act qualifies as a sufficiently compelling government interest to satisfy the requirements of strict scrutiny . . . . While the Court's decision to assume this important point arguendo is no holding, . . . the assumption itself is encouraging because it confirms the view that the intentional creation of majority-minority districts is not necessarily a violation of Shaw I, . . . and it indicates that the Court does not intend to bring the Shaw cause of action to what would be the cruelly ironic point of finding in the Voting Rights Act of 1965 (as amended) a violation of the Fourteenth Amendment's equal protection guarantee . . . . Justice O'Connor's separate opinion . . . bears on each of these points all the more emphatically, for her view that compliance with § 2 is (not just arguendo) a compelling state interest and her statement of that position virtually insulate the Voting Rights Act from jeopardy under Shaw as such.

Id. at 2007 (Souter, Ginsburg and Breyer, JJ., dissenting) (citations omitted).

On the second issue, the six Justices included Chief Justice Rehnquist and Justices O'Connor, Kennedy, Stevens, Ginsburg, and Breyer. Justice O'Connor writing for Chief Justice Rehnquist and herself, stated that "[i]f the State has a 'strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race 'substantially addresses the § 2 violation,' it satisfies strict scrutiny.'" *Id.* at 1960 (citations omitted). Writing separately, Justice O'Connor echoed this conclusion in her *Bush* concurrence:

> If a State has a strong basis in evidence for concluding that the *Gingles* factors are present, it may create a majority-minority district without awaiting judicial findings. Its 'strong basis in evidence' need not take any particular form, although it cannot simply rely on generalized assumptions about the prevalence of racial bloc voting.

Id. at 1970 (O'Connor, J., concurring). In his concurrence, Justice Kennedy pointed out that:

> in order for compliance with § 2 to be a compelling interest, the State must have a strong basis in the evidence for believing that all three of the threshold conditions for a § 2 claim are met:

In describing strict scrutiny's narrow tailoring requirement, the Fifth Circuit stated that "a tailored response to a found violation" is one which considers race at the expense of traditional political concerns "no more than is reasonably necessary to remedy the wrong."[84] The Court's definition was formulated from the Supreme Court's definition in *Bush*. Justice O'Connor and seven other Justices described this requirement as one which "substantially addresses the § 2 violation."[85] The Court surmised that upon such a showing by

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> [F]irst, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Id. at 1971 (Kennedy, J., concurring) (citing Growe v. Emison, 507 U.S. 25, 29 (1993), quoting *Gingles*, 478 U.S. at 50-51). Justice Stevens, joined by Justices Ginsburg and Breyer, stated that

> [t]he plurality admits that a State retains "a limited degree of leeway" in drawing a district to alleviate fears of § 2 liability . . ., but if there is no independent constitutional duty to create compact districts in the first place, and the Court suggests none, there is no reason why noncompact districts should not be a permissible method of avoiding violations of law. Because [the districts in *Bush*] satisfy the State's compelling interest and do so in a manner that uses racial considerations only in a way reasonably designed to ensure such a satisfaction, I conclude that the Districts are narrowly tailored.

Bush, 116 S. Ct. at 1989-90 (Stevens, Ginsburg & Breyer, JJ., dissenting).

[84] *Clark*, 88 F.3d at 1406.

[85] The seven Justices included Chief Justice Rehnquist and Justices O'Connor, Kennedy, Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor writing for Chief Justice Rehnquist and herself, stated that "the district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Bush*, 116 S. Ct. at 1961. In Justice O'Connor's concurrence, she reiterated her stance on narrow tailoring:

> [I]f a State pursues [a] compelling interest by creating a district

Calhoun County, race-based redistricting like the one proposed by Clark would serve to remedy Calhoun County's found violation of the Voting Rights Act.

The Court hinted, through its analysis of *Bush* and *Shaw II*, that if Clark's proposed race-based redistricting plan had been ripe for review by the Fifth Circuit, it would have been found constitutional. The Court's analysis of these cases, therefore, uncovered a new compelling interest, and recognized that state-sponsored race-based affirmative action programs in redistricting are not per se unconstitutional. Although *Bush* and *Shaw II* were perceived by some to prohibit race-based redistricting,[86] the Fifth Circuit's analysis of these opinions leads to the opposite conclusion.

IV. "WATERED-DOWN" STRICT SCRUTINY AS THE NEW TEST FOR RACE-BASED REDISTRICTING

Because courts apply strict scrutiny to all state-sponsored, race-based affirmative action programs,[87] the Fifth Circuit's conclusion to

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> that 'substantially addresses' the potential liability [under § 2] . . . and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons . . . its districting plan will be deemed narrowly tailored." *Id.* at 1970 (O'Connor, J., concurring). Justice Kennedy echoes this requirement, stating that "[i]f a State has the assumed compelling interest in avoiding § 2 liability, it still must tailor its districts narrowly to serve that interest. [T]he districting that is based on race [must] 'substantially addres[s] the § 2 violation."

Id. at 1971 (Kennedy, J., concurring) (brackets in original) (citation omitted). Justice Stevens, joined by Justices Ginsburg and Breyer contended that it was applicable in *Bush*. *Id.* at 1989-90 (Stevens, Ginsburg and Breyer, JJ., dissenting). Justice Souter, joined by Justices Ginsburg and Breyer acknowledge the possibility. *See id.* at 2008-09 (Souter, Ginsburg and Breyer, JJ., dissenting).

[86] *See* Garrett Epps, *The Supremes Find a Theme; The Court Steers*, WASH. POST, July 7, 1996, at C01 ("In one of its major decisions this term, the Supreme Court ruled 5-4 in the *Bush v. Vera* case that the Constitution prohibited the use of race as the primary motivation in drawing the boundaries of congressional districts").

[87] *See* Adarand v. Pena, 515 U.S. 200, 220 (1995), *supra* note 5.

apply strict scrutiny to Calhoun County's race-based redistricting is not surprising.[88] In fact, the Fifth Circuit applied the same strict scrutiny analysis to Calhoun County's redistricting plan that the Supreme Court applied to the redistricting plans in *Bush* and *Shaw II*. The following analysis reveals, however, that the majority of the Supreme Court Justices did not apply traditional strict scrutiny in *Bush* and *Shaw II*, but instead applied "watered-down" strict scrutiny.

A. "Watered-Down" Strict Scrutiny Defined

Strict Scrutiny is "watered-down" by not requiring the State to prove that its redistricting scheme is "narrowly tailored" in the traditional sense (i.e., the least burdensome alternative), but instead merely requiring proof that the burdens are "no more than is reasonably necessary to remedy the wrong." [89] The difference, while subtle, is significant. [90] Amidst speculation regarding reasons for this change, *Bush* and *Shaw II* provide no clear answer. What is clear is that the majority of the Supreme Court has adopted this approach with regard to race-based voter redistricting.[91] To disprove a claim that the difference in Supreme Court language is merely semantic, it is necessary to consider Justice O'Connor's description of strict scrutiny in prior affirmative action cases. This underscores the fact that the Supreme Court Justices intentionally created a standard different from traditional strict scrutiny.

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[88] *Clark*, 88 F.3d at 1405.

[89] *Id.* at 1406.

[90] The difference is significant because the Court's "watered-down" strict scrutiny does not fall to the level of intermediate scrutiny, which evaluates state action on whether it is "'substantially related' to the achievement of an 'important governmental objective.'" *See* Adarand 515 U.S. at 220 (citing Regents of Univ. of California v. Bakke, 438 U.S. 265, 518–19 (1978)).

[91] *See infra* notes 96-98 and accompanying text.

1. Through the Eyes of Justice O'Connor: The Historic Disapproval of "Watered-Down" Strict Scrutiny

In 1987, the Supreme Court in *United States v. Paradise*[92] upheld a decree requiring that fifty percent of promotions to corporal in the Alabama State Troopers be allotted to blacks until they comprised twenty-five percent of that rank.[93] This remedy was instituted to redress four decades of egregious discrimination and was found to satisfy the narrowly tailored prong of strict scrutiny.[94] The majority purported to apply strict scrutiny in ascertaining whether Alabama's promotion practice was valid under the Equal Protection Clause,[95] but indicated that the least restrictive alternative was not required for remedial classification plans.[96] The Court emphasized that choosing an appropriate remedy was a balancing process which the trial court was suited to administer in its sound discretion, if exercised within constitutional and statutory limitations.[97] Because no single remedy was universally applicable, however, each of the remedial classification plans must be evaluated in light of the particular circumstances and options available in the given case.[98] The Court stated that "[w]hile a remedy must be narrowly tailored, that requirement does not operate to remove all discretion from the District Court in its construction of a remedial decree."[99]

Responding to the Court's application of a "watered-down" strict scrutiny, Justice O'Connor dissented.[100] This scathing dissent illustrated her disapproval of watered-down strict scrutiny in an affirmative action context: "The plurality today purports to apply

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92 480 U.S. 153, 153-154 (1987).
93 *Id.* at 153-54.
94 *Id.* at 166.
95 *Id.*
96 *Id.* at 184.
97 *Paradise*, 480 U.S. at 184.
98 *Id.*
99 *Id.*
100 *Id.* at 195, 197 (O'Connor, Rehnquist & Scalia, JJ., dissenting).

strict scrutiny, and concludes that the [remedial measure] was narrowly tailored for its remedial purpose. Because the Court adopts a *standardless view* of 'narrowly tailored' *far less stringent* than that required by strict scrutiny, I dissent."[101] She stated that in order "to survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy."[102]

Two years after her *Paradise* dissent, Justice O'Connor wrote the Supreme Court's plurality opinion in *Richmond v. J.A. Croson Co.*,[103] where she reiterated her disapproval of "watered-down" strict scrutiny with regard to affirmative action: "The dissent's *watered-down* version of equal protection review[104] effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decision

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[101] *Id.* at 197 (O'Connor, Rehnquist & Scalia, JJ., dissenting) (emphasis added).

[102] *Paradise*, 480 U.S. at 199 (O'Connor, Rehnquist & Scalia, JJ., dissenting).

[103] Richmond v. J.A. Croson Co., 488 U.S. 469, 476 (1989). The Supreme Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. *Id.* at 731.

[104] *Id.* at 494 (emphasis added). Justice O'Connor strongly disagreed with Justice Marshall's watered-down strict scrutiny approach and stated that:

> [u]nder the standard proposed by Justice Marshall's dissent, 'race-conscious classifications designed to further remedial goals,' . . . are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is 'designed to further remedial goals,' without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the 'remedial' conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender.

Croson, 488 U.S. at 494-95.

See, also Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme").

making such irrelevant factors as a human being's race' will never be achieved."[105]

In 1995, eight years after *Paradise*, Justice O'Connor delivered the opinion for the Court in *Adarand v. Pena*.[106] Emphasizing the Court's strict scrutiny of affirmative action, Justice O'Connor stated that the Court's cases through *Croson* established a variety of propositions with respect to governmental racial classifications.[107] The most pertinent proposition identified by Justice O'Connor was that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination."[108] Clearly, Justice O'Connor was applying strict scrutiny to affirmative action cases through 1995.

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[105] *Id.* (internal citations omitted) (emphasis added).

[106] *Adarand*, 515 U.S. at 204. In *Adarand*, the Court considered a disappointed bidder's Fifth Amendment equal protection challenge to a federal subcontractor compensation clause that gave preferential hiring to minority subcontractors. *Id.* The Court held that all racial classifications imposed by whatever federal, state or local governmental actor, must be analyzed by the reviewing court under strict scrutiny analysis. *Id.* at 220.

[107] *Id.* at 223-24 (stating:

> the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: [a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination, . . . [s]econd, consistency: the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification, . . . [a]nd third, congruence: [e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

Id. (internal quotations omitted)).

[108] *Id.*

2. The Supreme Court's Recent Adoption of "Watered-Down" Strict Scrutiny—A Significant Change

After eight years of endorsing strict scrutiny and chastising watered-down strict scrutiny, Justice O'Connor apparently changed her position with regard to affirmative action race-based redistricting. Writing for the plurality in *Bush*, O'Connor stated:

> If the State has a "strong basis in evidence," for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "*substantially* addresses the § 2 violation," it satisfies strict scrutiny. We thus reject, as *impossibly stringent*, the District Court's view of the narrow tailoring requirement, that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria."[109]

In other words, the "narrow tailoring requirement of strict scrutiny allows the States a limited degree of *leeway* in furthering such interests."[110] Justice O'Connor and the current majority of the Supreme Court have thus regressed from strict scrutiny to the "watered-down" strict scrutiny she called "standardless" and "far less stringent" in *Paradise*.[111]

Of the seven Justices who adopted "watered-down" strict scrutiny, clearly Justice O'Connor is the most surprising. Her adoption of "watered-down" strict scrutiny after eight years of clearly applying strict scrutiny is significant for two reasons. First, in writing the *Bush* plurality opinion, Justice O'Connor and those Justices joining her clearly appreciated the difference between strict scrutiny

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[109] *Bush*, 116 S. Ct. at 1960 (emphasis added) (citations omitted).

[110] *Id.* (internal quotations omitted) (emphasis added).

[111] *See Paradise*, 480 U.S. at 196 (O'Connor, Rehnquist and Scalia, JJ., dissenting).

and "watered-down" strict scrutiny. Second, the effect of the majority of the Justices' adoption of "watered-down" strict scrutiny is that the level of proof required for States to meet the "narrow tailoring" prong of strict scrutiny will be lowered.

B. Speculation on Why the Supreme Court Lowered Its Scrutiny Toward Race-Based Redistricting

Coupled with the Supreme Court's move to "watered-down" strict scrutiny of race-based redistricting, the Fifth Circuit's analysis apparently places the stamp of constitutional approval on the use of race-based factors in voter redistricting without fear of the district's unconstitutionality. Why would the Supreme Court decide to allow the State greater flexibility in redistricting cases? A definite answer is not found in the Supreme Court's opinions. One plausible explanation lies in the distinction between fundamental rights cases in which courts require state actors to apply the least restrictive alternative, and remedial classification cases where the courts do not. In fundamental rights cases, the court seeks to ensure that a clearly identified constitutional right such as the right to vote is not compromised in favor of a compelling state interest in, for example, ensuring that voters are knowledgeable.[112] In these cases, the right to vote clearly takes precedence, and any other effective way of serving the state's interest should be utilized before restrictions are permitted to be placed on exercise of the fundamental right.[113] On the other hand, in remedial classification cases, both interests are of a constitutional dimension.[114] These competing interests, therefore, should be balanced.[115] In other words, it would seem inappropriate that the rights of "innocent" third parties should be viewed as

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[112] Solomon Oliver, Jr., *Litigating The Constitutionality of State and Local Affirmative Action Plans: Issues and Approaches*, 10 REV. LITIG. 55, 93 (1990).
[113] *Id.*
[114] *Id.*
[115] *Id.*

fundamental rights, requiring that no alternative should be able to affect those interests except as a last resort.[116] Furthermore, the least restrictive alternative standard implies that only one alternative is appropriate in a given situation.[117] Due to the complex factors and considerations involved, however, it is impossible to determine a remedy with mathematical precision.[118] The Court, therefore, should uphold the exercise of discretion by legislatures charged with decision-making, provided that the decision was premised on a sound basis and relevant alternatives were canvassed.[119]

This distinction is helpful in discerning the Supreme Court's rationale for lowering the level of scrutiny applied to race-based voter redistricting. Although the Court's actual reasoning for adding a new compelling interest and lowering the level of scrutiny may remain hazy, these actions should ensure continued use of race as a factor in voter redistricting.

V. CONCLUSION

In *Clark*, the Fifth Circuit held that Calhoun County's redistricting plan violated Section 2 of the Voting Rights Act.[120] The Court reached this conclusion by combining the District Court's finding that Clark had established a prima facie case of vote dilution, with the Fifth Circuit's finding that under the totality of the circumstances Clark had demonstrated a Section 2 violation under the Voting Rights Act.[121] Although the Fifth Circuit found that Clark's proposed race-based redistricting plan was not ripe for review, the Court suggested that if it had been ripe, it would have been found constitutional. The Fifth Circuit's analysis of *Bush* and *Shaw II*

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[116] *Id.*
[117] *Id* at 94.
[118] *Id.*
[119] *Id.*
[120] *Clark*, 88 F.3d at 1400.
[121] *Id.*

uncovered a new compelling interest while recognizing that state-sponsored, race-based affirmative action programs in redistricting will not always be found unconstitutional. The Fifth Circuit's findings and the Supreme Court's recent move to "watered-down" strict scrutiny should ensure continued use of race as a factor in voter redistricting.